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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-471

DONALD C. McDOUGAL,
Appellant,

v.

COUNTY OF IMPERIAL,
Appellee.

On Appeal From the Supreme Court of California

OPPOSITION TO MOTION TO DISMISS

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California Rule of Court #216 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-471

DONALD C. McDOUGAL,
Appellant,

v.

COUNTY OF IMPERIAL,
Appellee.

I

THE RECORD BELOW IS CLEAR

Appellee, hereinafter referred to as "the County" asserts at page 3 of its Motion to Dismiss that the State Supreme Court has refused to hear a "new contention" on appeal. This should not be interpreted as indicative of an unclear record below.

The issue of estoppel to assert that the condition is unconstitutional was not raised by the County either in its original pleadings or in the joint pretrial statement (included as Appendix A) (Clerk's Transcript, page 310) which by California law becomes the whole pleading underlying the case. (California Rule of Court #216, *Fitzsimmons v. Jones* (1960) 179 Cal.App.2d 5). The issue was not raised at trial.

The issue was first raised on appeal to the intermediate appellate court, in Respondent's Opening Brief. The Court of Appeal, 4th District did not rule on this point, but it was nevertheless argued by Appellant, (hereinafter referred to as "McDougal") in his Response to the Amicus Curiae Brief of the State Water Resources Control Board et al., before the California Supreme Court (p. 9-10). (Set out in Appendix B)

In that brief, McDougal clearly and unequivocally asserted that estoppel could not be raised against a Constitutional challenge to a condition imposed on a grant of right.

The "new contention" of which the California Supreme Court spoke of in its denial of McDougal's Petition for Rehearing was that Simpson had accepted the condition in his permit because of "duress."

While McDougal did mention the term "duress," in a quotation from *Union Pacific Railroad v. Public Service Commission,* 248 U.S. 67 (1918), his main contention on rehearing was that the California Supreme Court had failed to distinguish between unconstitutional conditions and conditions invalid for other reasons in applying its estoppel. McDougal contended and still contends that:

1) Where a condition had been imported into a State or local permit, license or grant of right which is unconstitutional, a rule of unconstitutional conditions is applied; particularly in Commerce Clause cases and cases involving the right of the litigant to go into federal court.

2) In order to determine if there has been a waiver of these federal Constitutional rights, a body of federal law must be examined.

The body of the petition for rehearing before the California Supreme Court is included in Appendix C to this Brief.

II

THE STATE COURT DECISION IS NOT BASED ON AN ADEQUATE INDEPENDENT STATE GROUND

Appellee, the County, claims that the U. S. Supreme Court is powerless to review the case at bar because the State Supreme Court has decided, *on state estoppel grounds*, that Appellant McDougal cannot challenge the restriction in his permit as unconstitutional.

Obviously, to be an effective court of last resort, the United States Supreme Court cannot allow its hands to be tied by decisions of the state courts on what cases it should and should not review.

Where a State attaches unconstitutional conditions to a grant of right, the U. S. Supreme Court is the proper court to determine whether or not the party is estopped to challenge those conditions.

In *Davis vs. O'Hara,* 266 U.S. 314, 318 (1924), a state Supreme Court held that the Director General of the Railroads had waived governmental immunity under a federal statute. The U. S. Supreme Court stated that it was . . .

> ". . . not bound by the decision of the State Court that defendant waived his federal right under the act . . . and it may determine for itself whether he sufficiently asserted and insisted upon that right." p. 318

Rutland involved a squabble about whether a Lessee who paid an unconstitutional tax ought to be able to receive credit from his Lessor. There was no federal question of estoppel.

Despite the citation of 28 cases by the Appellee County, it has failed to produce one case in which a clearly unconstitutional condition on a grant of right was upheld using state estoppel grounds.

On the contrary, the federal courts have refused to allow state courts to enforce these unconstitutional conditions by way of estoppel. *W. W. Cargill Co. v. Minnesota,* 180 U.S. 452 468 (1901), *Pullman v. Kansas,* 216 U.S. 56, 63 (1910), *Terral v. Burke Construction,* 257 U.S. 529, 532 (1922). Also: *Surmeli v. State of New York,* 412 F.Supp. 394 (1976).

Respectfully submitted,

DONALD C. McDOUGAL, JR.
ALEX A. HARPER

APPENDICES

APPENDIX "B"

EXCERPT FROM McDOUGAL'S "RESPONSE TO THE AMICUS CURIAE BRIEF OF THE STATE WATER RESOURCES CONTROL BOARD ET AL." BEFORE THE CALIFORNIA SUPREME COURT.

In *Davis v. Wechsler,* 263 U.S. 22, 24 (1923) the U. S. Supreme Court stated:

> "We are of the opinion that the judgment must be reversed. Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice . . .
>
> "The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principal is general and necessary."

Union Pacific Railroad v. Public Service Commission, 248 U.S. 67, 69-70 (1918), involved a state court determination that the railroad could not assert any federal right to challenge a certain tax because it had applied to pay the tax, in order to continue to do business. The Court stated:

> "It is argued that a decision on this ground excludes the jurisdiction of this Court. But the later decisions show that such is not the law and that on the contrary it is the duty of this Court to examine for itself whether there is any basis in the facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived." pp. 69-70

See also: *Garrity v. New Jersey,* 385 U.S. 493 (1967); *Creswill v. Knights of Pythias,* 225 U.S. 246 (1912); *Able State Bank v. Bryan,* 282 U.S. 765 (1931); *Sterling v. Constantin,* 287 U.S. 378, 398 (1932).

The cases cited by the County are not applicable to the case at bar.

Johnson v. New Jersey, 384 U.S. 719 (1966) (Cited at p. 4 of Appellee's Brief) did not involve estoppel, but simply upheld a state procedural rule which gave the criminal defendant a fair opportunity to raise his constitutional rights.

McCoy v. Shaw, 277 U.S. 302 (1928) upheld a state court decision that an injunction was not proper because the taxpayer had an adequate remedy at law by paying the tax and then suing for its recovery. This had nothing whatsoever to do with a state estoppel to assert a federal constitutional right.

Enterprise Irrigation District v. Farmer's Mutual Canal Co., 243 U.S. 157 (1916) at p. 5 of the County's brief, involved a weak equal protection claim by a party who had stood by while his opponent had spent vast sums in reliance on his inaction in opposing the water appropriation involved. This situation bears little relationship to the case at bar where the condition involved is clearly unconstitutional and there are no disastrous consequences possible should McDougal prevail.

The massive reliance involved would have made it inequitable to grant relief in the *Enterprise Irr. Dist.* case under either state or federal principles of estoppel.

Pierce v. Somerset Railway, 171 U.S. 641 (1896) cited at page 6 of the County's brief, involved another weak claim of federal right, this time under the impairment of contracts clause of the Constitution. Trustees of a railway had stood by and watched as others organized a plan to save the faultering

railroad. The reliance, was again, massive and estoppel lied under either state or federal law.

Lowry v. Silver City Gold and Silver Mining Company, 179 U.S. 196 (1900) cited at page 7 of the County's brief, did not even involve the assertion of a federal Constitutional right, and is thus off point.

Further cases cited by the Appellee on page 7 of its Motion to Dismiss are not helpful. The only common features presented by these cases are the facts that they all mention the word "estoppel" at least once and are all cited on the same page of Appellee's brief.

Moffett v. Commerce Trust, 329 U.S. 669 (1946), *McSweeney v. Equitable Trust Co.,* 315 U.S. 785 (1942), *Waesche v. Thurmont Bank,* 305 U.S. 560 (1938), and *Bell Telephone Co. of Penn. v. Van Dyke,* 296 U.S. 533 (1935) need little comment except to note that they are memorandum decisions upholding state court judgments where no estoppel to assert a strong federal Constitutional claim is present.

Twin Falls County v. Henderson, 305 U.S. 568 (1938) and *Southern Nebraska Power Co. v. Nebraska ex rel. Sorenson,* 299 U.S. 520 (1936) involve cases where a state was held estopped to challenge the constitutionality of a statute it had passed itself.

Utley v. Saint Petersburg, 292 U.S. 106 (1934) upheld an estoppel arising out of a landowner's failure to challenge an assessment where he had ignored a state procedure for doing so and the challenge was clearly frivilous.

Beals v. Cone, 188 U.S. 184 (1903) involved no federal right or estoppel to assert such.

Hale v. Lewis, 181 U.S. 473 (1901), *Gillis v. Steinchfield,* 159 U.S. 658 (1895), and *Sherman v. Grinnel,* 144 U.S. 198 (1892) involved frivolous Constitutional claims with tenuous relationships to the cases at hand.

Michigan v. Flint, 152 U.S. 363 (1894) held a state estopped to make a claim on land once granted by the federal government. No federal Constitutional right was asserted.

Israel v. Arthur, 152 U.S. 355 (1894) upheld a state estoppel against a wife's assertion that she should share in an inheritance from her first husband because she had remarried. No serious federal claim was asserted.

Marrow v. Brinkley, 129 U.S. 178 (1888) upheld a finding of laches against a land claimant. Again no federal Constitutional right was asserted.

Adams Co. v. Burlington and M River R. Co., 112 U.S. 123 (1884) and *Gibson v. Choutcau,* 111 U.S. 200 (1869) upheld a state court decision where no federal law was directly involved and no federal constitutional challenge was made.

The only "particular interest" associated with *Mobile, Jackson and K.C.R. Co. v. Mississippi,* 210 U.S. 187 (1907) and *Rutland Railroad v. Central Vermont Railroad Co.,* 159 U.S. 630 (1895) is why they were cited at all.

Mobile did not involve an estoppel to assert a violation of the Commerce Clause. Indeed the court ruled that the Commerce Clause was not offended. (p. 203)

APPENDIX "A"

EXCERPT FROM "JOINT PRETRIAL STATEMENT"

1. Whether the defendant's operation violates the County's zoning ordinances.

2. Whether defendant has the right to conduct the operation on the premises under the permit granted to Earle Simpson in 1967.

3. Whether defendant has a vested non-conforming right to use the premises for his operation.

4. Whether defendant's operation constitutes a public nuisance.

5. Whether the premises were governed in 1967 by the 1959 interim zoning ordinance (Ordinance 241).

6. Whether the condition inserted in the conditional use permit held by defendant and granted by plaintiff which states as follows: "The water will be sold only for use within the Imperial County" a valid and enforceable condition.

. . . Respondent's estoppel argument would have this Court reject any challenge to the unconstitutional condition here because the Appellant's predecessor in interest abided by the condition under a mistake of law.

The concept of estoppel was not meant to perpetuate unconstitutional conditions indefinitely, nor to allow state governmental bodies to accomplish under color of law unconstitutional objectives. Appellant has never acquiesced in this condition, but has maintained throughout that to abide by the condition would place him in violation of the Federal Civil Rights Act and Federal Discrimination Laws.

Edmunds v. County of Los Angeles, 40 Cal.2d 642 (1953) is not similar to the present case. In that case a *clearly valid* condition was challenged by a person who had not only accepted the benefits of the restricted permit, but also appeared to be making a superfluous challenge to an obviously valid condition. The *Edmunds* court seemed to be shocked by the clearly inconsistent position taken by the trailer park owner in that case.

In the case at bar, the appellant has consistently claimed from the first that the restriction on his permit was an illegal and unconstitutional restriction. Contrary to the *Edmonds* case, this affirmative defense to the case at bar is not superfluous. Even the Fourth District Court of Appeal recognized that this condition is clearly unconstitutional. If Appellant is estopped to challenge this unconstitutional condition, then none will be able to challenge it. It cannot be the policy of this state to allow counties to impose unconstitutional conditions under color of state law which

will be immune from later attack due to the recipient's initial mistake of law.

Appellant has repeatedly insisted that *nuisance law* is the correct way to handle this problem, rather than the more drastic method of revocation or forfeiture.

APPENDIX "C"

BODY OF PETITION FOR REHEARING BEFORE THE CALIFORNIA SUPREME COURT

L.A. 30681

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE COUNTY OF IMPERIAL, Plaintiff and Respondent, v. DONALD C. McDOUGAL, Defendant and Appellant.	L.A. 30681

PETITION FOR REHEARING AND STAY/SUPERSEDEAS PENDING REHEARING, OR PENDING RESULTS OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES SUPREME COURT

TO: THE HONORABLE CHIEF JUSTICE, and the Associate Justices of the Supreme Court of California:

DONALD C. McDOUGAL, the Appellant and Defendant in the above-entitled case, respectfully petitions this Court for a Rehearing to consider the Court's decision filed on May 25, 1977, by reversing said decision in that part which states that Petitioner, DONALD D. McDOUGAL is prohibited from selling water for use outside the County of Imperial. Petitioner's grounds for requesting this reversal are set forth below and it is on the basis of the authority cited herein, along with all papers and briefs already on file in this matter.

Petitioner further seeks a Stay and Writ of Supersedeas pending the Rehearing of this matter by the Court. Petitioner would ask that the Court Stay its judgment insofar as it prohibits Petitioner from selling water for use outside the County of Imperial, and to issue a Writ of Supersedeas allowing Petitioner to engage in International and Interstate Commerce pending the Rehearing of this matter by this Court. If this Court does not see it fit to grant Rehearing, Petitioner still requests this Stay and Writ of Supersedeas pending Petition for Writ of Certiorari to the United States Supreme Court and asks that said Stay and Writ Issue and remain in full force and effect until such time as the United States Supreme Court either accepts the Petition for Writ of Supersedeas automatically be extended until such time as the United States Supreme Court renders its decision, or if the United States Supreme Court declines to take the case on Certiorari, then at the time of the notice of the declining by the United States Supreme Court, that the Stay and Writ of Supersedeas then automatically expire.

PETITION FOR REHEARING

Petitioner (appellant) seeks a rehearing of that part of the Court's decision affirming the Court below, under Rule 27a of the Rules on Appeal, upon the grounds that there is a substantial error of law in the decision of the Supreme Court set forth in that decision.

The Supreme Court affirmed in part and reversed in part.

In that portion of the opinion in which the Court affirmed, it did so upon the express ground that one who has applied for a conditional use permit or other special permit is estopped or

otherwise waives his right to contest the invalidity of that condition. That this waiver or estoppel is binding upon his successor in interest. See the decision at pages 7 and 8.

However, the Court failed to address itself to the distinction between unconstitutional invalidity and other forms of invalidity, except to note that appellant's citation of *Shelley v. Kraemer*, (1947), 334 U.S. 1 (a case arising under the Fourteenth Amendment) was inapposite.

But, in failing to distinguish between unconstitutional conditions and other forms of invalid conditions, the Court failed to take into account a substantial body of law which has carved out this distinction both in the United States Courts and in California.

That body of law first arose because of legislative discrimination against foreign corporations, but later extended to foreign corporations or other persons whose constitutional rights were being interfered with by the attachment of unconstitutional conditions to various special permits. See 5 Witkins Summary of California Law 8th Edition, Unconstitutional Conditions, Theory and Development of Doctrine, Section 409 and Application Outside Field of Foreign Corporations, Section 410.

The doctrine seems first to have been developed in *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1 [30 S.Ct. 190, 54 S.Ct. 355], where the Court held that the state could not attach to a permit, granted to a foreign corporation engaged in interstate commerce to come into the state and do business there, a condition which directly or indirectly interfered with interstate commerce and thus was repugnant to the commerce clause of the United States Constitution.

The Court rested its decision upon the ground that in all the cases in which the Court considered the subject of granting by a state to a foreign corporation consent to the transaction of business in the state, it has been uniformly held that no conditions can be imposed by the state which are repugnant to the Constitution and law of the United States. See the opinion at page 36.

The Western Union Telegraph Company had in fact applied for the permit, although it felt it was not required to do so.

In *Terral v. Burke Construction Co.* (1922) 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed. 352; see generally 42 Harv. L. Rev. 676; 15 Cal. L. Rev. 316; 16 Cal. L. Rev. 228, the Court considered the very distinction between an unconstitutional invalidity and other forms of invalidity, glossed over by this Court, in which the entity had applied for and accepted the special permit, with its unconstitutional condition and thereafter the Courts sought to enforce the invalid condition.

In that case, the appellee, a foreign corporation, applied for and received a license to do business within the state upon the express condition that it give up its constitutional right to either remove a suit to the Federal Courts or file suit directly in the Federal Courts.

Having in fact both removed a state action and filed an action in Federal Court, the State was proceeding to revoke its charter.

The United States Supreme Court thereupon enunciated the following rule:

> "The principle established by the more recent decisions of this Court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver, of the exercise of its constitutional right to resort to the Federal Courts or thereafter withdraw the privilege of doing business because of its exercise of such right, *whether waived in advance or not.*" (Emphasis added.)

The Court made it clear that it rested its decisions upon the principle that the state in the exercise of its sovereign power is subject to the limitations of the United States Constitution, including the commerce power and the due process clause.

Thus, the United States Supreme Court put to rest the spectre of waiver of constitutional rights by holding that whether waived in advance or not, the applicant for a special permit could not thereby be deprived of his constitutional rights by including a waiver of his constitutional rights in the permit.

Viewed in this light, City of Altus, *Oklahoma, et al., v. Carr,* (1966) 255 F.Supp. 828, (affirmed by the U.S. Supreme Court without opinion at 385 U.S. 35, noted by the Court in footnote 3) as well as *Shelley v. Kraemer,* (noted by the Court in footnote 3), both become binding precedents.

In *Danskin v. San Diego Unified School District,* (1946) 28 C.2d 536, 545, 171 P. 2d 885, a statute requiring denial of the use of school buildings for meetings of subversive groups was held unconstitutional upon the authority of *Western Union Telegraph Co. v. Kansas,* 216 U.S. 1 [30 S.Ct. 190, 54 S.Ct. 355], *supra*, Terral v. Burke Construction Co. (1922) 257 U.S.

529, *supra*, the Court reasoning that the state did not have to make its school buildings available for public meetings but if it did so it could not attach to the privilege conditions depriving members of the public of their constitutional rights.

The United States Supreme Court reiterated its position that there are rights of constitutional stature whose exercise a state may not condition by the exaction of a price. That among these rights are engaging in interstate commerce, resort to the Federal Courts in diversity cases, burdening the exercise of the Twenty Fourth Amendment. *Garrity v. New Jersey* (1967) 385 U.S. 493, 87 S.Ct. 616, 620, 17 L.Ed. 2d 562, 567, *Cal. Evidence*, 2d Supp., §899A. The Court in *Garrity* (*supra*) further stated that:

> "It is said that there was a "waiver." That, however, is a federal question for us to decide. *Union Pac. R.R. Co. v. Pub. Service Comm.*, 248 U.S. 67, 60-70; *Stevens v. Marks*, 383 U.S. 234, 243-244. The Court in *Union Pac. R. R. Co. v. Pub. Service Comm., Supra*, in speaking of a certificate exacted under protest and in violation of the Commerce Clause said:
>
> > 'Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in the case of a failure to accept it, and then to declare the acceptance voluntary . . .' Id., at 70.
>
> Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other.

> 'It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.' " Ibid.

This is exactly the same case as the case presently before the Court. The County Board of Supervisors of Imperial County, along with its Planning Commission, clearly exacted from appellant's predecessors in interest's "waiver" by duress. The minutes of that meeting where exhibit "M" at trial, and also attached as Appendix "B" on Answer to Amicus Curiae Brief by the County of Imperial.[1]

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[1] The minutes state in part:

Chairman Kilgore called the meeting to order and advised those present that the Board of Supervisors and the Planning Commission are meeting in joint session to discuss various items of concern to both.

Chairman Kilgore directed Mr. T.J. Sands, Attorney for Mr. W. Erle Simpson, to come forward and state his reasoning for a zoning permit being granted to include water exportation to Mexico. He further stated that since the Board and Commission are now meeting to reach a decision in regards to a Water Exportation Policy, that this is the best time to hear the application.

Mr. Sands, Attorney for Mr. Simpson, stated that his client has gone over the permit application with him, and has agreed to remove the portions stating or indicating any sale of water to Mexico; however, he requested that the application be approved to allow the sale of certain portion of water to Mexico up to 12-31-68, at which time it would cease. He further stated that the amount sold to Mexico would only be equal to the amount now being sold to Mexico by other persons who own wells in the area. He also stated that approximately 9 trucks per day are exporting water to Mexico, and that his client's exportation would certainly not exceed that. . . .

Of course in any event *Terral* (*supra*) settles the question of the waiver of their basic constitutional rights, such rights arising under the Commerce Clause, that states cannot exact a "waiver" of such constitutional rights, whether waived in advance or not.

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cont. [1]Chairman Kilgore stated that exactly 21 trucks per day during a seven day period go into Mexico. He further stated that none of the current operations have submitted application to this Board of Supervisors for approval of exporting water into Mexico, and, if granted, were prior to this Board of Supervisors.

Discussion was held on just what the County could do to restrict or prohibit the exportation of water.

John Pattie, Deputy County Counsel, stated that after considerable research, the findings of the County Counsel is that there is no conflict with the Federal Constitution as far as Interstate or International Commerce is concerned, as to how the local agencies control their natural resources.

Supervisor Langley, stated that in short, we have the right to set our own policy. . . .

Mr. Sands questioned if he would be in favor of a limited period of time, as previously requested, up to 12-31-68.

Chairman Kilgore stated that his main purpose in referring the permit application to the Board of Supervisors was to determine a Policy, because of his concern over the amount of water being taken out of this area.

Mr. Sands questioned if the planning Commission would be opposed to any sale of water to occupants of the Valley.

Commissioner Bornt stated that he was not, and had never indicated such, nor had the members of the Boards, their main concern was the amount of water being exported out of our County....

Supervisor Langley stated that if at all possible, the *exportation of water into Mexico, should be stopped. . . .*

Chairman Kilgore directed Mr. Sands to resubmit the zoning application to the Planning Commission with the understanding of knowing the Board's purpose and intention of adopting, in conjunction with the Planning Commission, a definite Water Exportation Ordinance.

Commissioner Bornt stated that the permit could be granted this morning when the Planning Commission meets, under the Interim Zoning Ordinance, subject to the restriction of the water being sold only within the County of Imperial." [Emphasis added]

It is clear, therefore, that the reliance of this Court upon the cases involving estoppel to assert the invalidity of the conditions imposed a special permit by accepting that permit is misplaced where the invalidity, as here, is its repugnance to the Commerce Clause of the United States Constitution.

PETITION FOR STAY AND WRIT OF SUPERSEDEAS

Petitioner and Appellant, DONALD C. McDOUGAL, hereby petitions this Court for a Stay of its Order entered on May 25, 1977, which states that Petitioner Appellant is prohibited from selling water for use outside the County of Imperial. Petitioner only asks that the part of the Court decision be stayed and that the balance of the Court's decision which reverses the findings of lower Court remain affirmed and become final.

Along with the Stay of the Court's findings, the Petitioner also asks that this Court issue a Writ of Supersedeas ordering that Petitioner be allowed to engage in Interstate Commerce and International Commerce from his well pending the rehearing by this Court of this matter. The grounds for this Writ are contained in the Petition for Rehearing above. Should this Court not see fit to rehear this case, Petitioner still asks that the Stay and Writ of Supersedeas issue from this Court and that this Stay and Writ of Supersedeas be effective until such time as the United States Supreme Court has ruled on Petitioner's Petition for Writ of Certiorari. Should the United States Supreme Court see fit to grant Certiorari, Peitioner requests that the Stay and Writ of Supersedeas

remain in full force and affect until such time as the United States Supreme Court enters a decision in this case.

Respectfully submitted,

s/s
DONALD C. McDOUGAL, JR.

s/s
ALEX A. HARPER

Attorneys for Defendant and Appellant